Before the

Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 98-148
1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements	)	
Regulation of International Accounting Rates	)	CC Docket No. 90-337

NOTICE OF PROPOSED RULE MAKING

Adopted: August 6, 1998 Released: August 6, 1998

Comment Date: September 16
Reply Date: October 16

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

Table of Contents

I. Introduction

1. The Telecommunications Act of 1996 directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of all regulations issued under the Communications Act that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be "no longer necessary in the public interest."[1] In particular, the Act directs the Commission to determine whether any such regulation is no longer necessary "as the result of meaningful economic competition between providers of such service."[2] Accordingly, the Commission has begun a comprehensive 1998 biennial review to identify regulations that are overly burdensome or no longer serve the public interest.[3]

2. This *Notice* proposes significant changes to the Commission's International Settlements Policy (ISP) and associated rules. We are proposing these changes as part of our Congressional mandate to review our rules periodically and remove any rules which are no longer necessary. The rapid change occurring in the international telecommunications marketplace also dictates that we review our rules and remove those requirements that may impede lower consumer rates and service innovation.

3. In this *Notice*, we seek comment on our application of the ISP generally and propose to make several significant changes. First, we propose no longer to require U.S. carriers to comply with the ISP in certain circumstances. Specifically, we propose not to apply the ISP to arrangements: (1) between U.S. carriers and foreign carriers that lack market power in WTO Member countries; and (2) with foreign carriers in WTO Member countries to which U.S. carriers are authorized by the Commission to provide international simple resale (ISR). Arrangements between U.S. carriers and foreign carriers in non-WTO Member countries are not affected by the proposals in this Notice. We further propose, in those circumstances where we decline to apply the ISP, no longer to require U.S. carriers to file contracts or settlement rate information. Second, we propose to modify our flexibility policy to allow carriers to obtain authority to enter into flexible settlement arrangements for agreements affecting less than 25 percent of the traffic on a particular route without naming the foreign correspondent and without filing the terms and conditions of the actual agreement. We seek comment on the extent to which we should retain our filing requirements under these circumstances. Third, we seek comment on whether we should modify our rules governing ISR as a mechanism for putting increased pressure on international settlement rates. Fourth, we seek comment on the application of our existing competitive safeguards and whether, if we do make changes in our ISP, we should modify those safeguards.

4. This *Notice* also proposes several procedural changes to simplify our accounting rate filing requirements. First, we propose to require that all accounting rate filings be submitted under the same accounting rate modification filing rules. We also propose to remove the requirement that carriers serve such filings on all carriers providing service on the route when suitable information is

---

1 47 U.S.C. § 161.

2 47 U.S.C. § 161(a)(2).

3 *See* FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review, News Release (Feb. 5, 1998).

available electronically under our pending electronic filing system.

5. We believe it is important to consider these proposals to bring our rules in line with the significant changes in international telecommunications markets that have occurred recently. Our goal is to lower consumer prices by bringing the rates for terminating international calls as close as possible to cost and to foster innovation in the provision of international telecommunications services for U.S. carriers and consumers. To that end, we seek to promote further growth of competition in international markets and ensure that our rules help foster a market-based approach to terminating international calls. We further seek to lessen the regulatory burden on U.S. carriers by removing rules that are not necessary. We encourage comment on the proposals in this *Notice* and on any other approaches that could help achieve our goal.

II. Background

6. In a series of decisions starting in 1936, the Commission has regulated U.S. carrier participation in bilateral accounting rate negotiations with foreign carriers,[4] culminating with the adoption of the *ISP Order* in 1986.[5] This policy was developed to prevent foreign monopoly carriers from "whipsawing" U.S. carriers, or from playing U.S. carriers off against each other to the disadvantage of U.S. carriers and U.S. ratepayers.[6] It requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic. As we stated in our *ISP Order*, "[t]he policy of uniform settlements rates arose in response to the unique situation in the international telecommunications arena which places single governmental or quasi-governmental entities from other nations in direct negotiation with multiple private U.S. entities for the formation of operating agreements to arrange international services."[7] To ensure compliance with the ISP and other relevant rules, the Commission requires that all accounting rate agreements be filed with the Commission and made public.[8] The International Bureau may reject a particular

---

[4] *See Mackay Radio and Telegraph Company*, Inc., 2 FCC 592 (1936) *aff'd Mackay Radio and Telegraph Co. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company*, 25 FCC 690, 733-34 (1951), *rev'd on other grounds sub nom., RCA Communications, Inc. v. FCC*, 210 F. 2d 694 (D.C. Cir. 1952), *vacated and remanded*, 346 U.S. 86 (1953); *TRT Communications Corp.*, 46 FCC 2d 1042 (1974); *Uniform Settlement Rates on Parallel International Communications Routes*, Docket No. 21265, Memorandum Opinion and Order, 84 FCC 2d 121 (1980) (*USP Order*).

[5] *Implementation and Scope of the Uniform Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988). *See also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992). *See also* 47 C.F.R. 64.1001 (1998).

[6] For a discussion of whipsawing and its harmful effects, see *USP Order*, 84 FCC 2d 121, ¶ 4-5.

[7] *See ISP Order*, 51 Fed. Reg. 4736, ¶ 3.

[8] *See* 47 C.F.R. 64.1001(l)(2) (1998).

agreement if it finds that its terms and conditions do not serve the public interest.[9]

7. As a supplement to the ISP, the "No Special Concessions" rule prohibits a U.S. international carrier from agreeing to accept special concessions from a foreign carrier that has sufficient market power in the destination market to affect competition adversely in the United States.[10] The Commission has found that special concessions granted to a particular U.S. carrier by a foreign carrier with market power pose an unacceptable risk of anticompetitive harm in the U.S. international services market.[11] Prior to adoption of the *Foreign Participation Order,* the Commission prohibited the acceptance of special concessions from all foreign carriers. In that *Order,* the Commission modified the rule so that it applies only to U.S. carrier dealings with foreign carriers that possess market power in the foreign market.[12] The Commission reasoned that special concessions granted by a foreign carrier that does not possess market power can serve the public interest in certain circumstances, for example, by allowing carriers to offer innovative services that reduce rates for U.S. consumers.[13]

8. These policies have, to a significant extent, been successful in protecting U.S. carriers and U.S. consumers in their dealings with monopoly foreign carriers. U.S. carriers have largely been able to avoid the situation of a monopoly foreign carrier playing one U.S. carrier against the other to extract the highest possible settlement rates. However, the Commission has recognized that these rules are not necessary on routes where there is competition in the foreign market and that they may, in fact, impede the further development of competition on such routes.[14] The ISP prohibits discrimination among U.S. carriers by monopoly foreign carriers by maintaining parity among all U.S. competitors. As a result, the ISP has the effect of limiting competition among U.S. carriers to achieve lower settlement rates and insulating foreign administrations from competitive pressure by individual U.S. carriers that seek to lower settlement rates. These restrictions may be a necessary corollary to our ISP where U.S. carriers are corresponding with a monopoly foreign carrier. However, the Commission believes that the ISP's restraints on competition are counterproductive on routes where

---

9 *Id.*

10 The No Special Concessions rule prohibits a U.S. international carrier from agreeing to accept special concessions with respect to traffic or revenue flows directly or indirectly from any foreign carrier that possesses market power in the foreign market. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Dockets No. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, 23,957-65, ¶¶ 156-170 (1997), *recon pending,* (*Foreign Participation Order*). A "special concession" is defined as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." *Id.; see also Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*), *recon pending.*

11 *Foreign Carrier Entry Order,* 11 FCC Rcd at 3971-72.

12 *See Foreign Participation Order,* 12 FCC Rcd at 23,956-65, ¶¶ 150-170.

13 *See id.,* 12 FCC Rcd at 23,957, ¶ 156.

14 *See Policy Statement on International Accounting Rate Reform,* 11 FCC Rcd 3146 (1996).

there are alternative means of terminating traffic in the foreign market.

9. The ISP may act to inhibit competition among U.S. international carriers in several ways. First, the ISP could potentially reduce incentives for U.S. carriers to negotiate low settlement rates. To a certain extent, uncertainty regarding settlement rates paid by competing U.S. carriers encourages carriers to bargain for the lowest possible settlement rate. Where each carrier is unsure of the rate negotiated by the other carriers, only aggressive negotiating will ensure that it is not foregoing the opportunity to negotiate a rate lower than a competitor. Conversely, where the rate negotiated by one carrier is available to all other carriers whether they negotiate or not, the negotiating carrier has a reduced incentive to negotiate aggressively because no matter how aggressively it negotiates, it will be unable to achieve a cost advantage vis-a-vis its competitors. Further, the carriers that are able to obtain the same rates negotiated by the other carrier have a reduced incentive even to enter into negotiations.[15]

10. Second, the proportionate return component of the ISP exerts a distorting effect on the market for international services because it can make it difficult for new carriers to enter the market.[16] The volume of outbound and inbound traffic are tied together under the proportionate return regime, with carriers receiving a settlement credit for each additional inbound minute. As a result, carriers can lower their costs by maximizing their outbound traffic. When new entrants enter the market, however, they have no record of outbound traffic and thus do not receive the benefits of proportionate return of inbound traffic to offset terminating outbound traffic. This means that, at least for an initial period after entry, new entrants may have difficulty competing against incumbents because they have a higher cost structure.

11. Finally, the ISP may inhibit competition at the retail level. Settlement rates are a significant component of the costs of providing international switched services. Because these rates are made public and all U.S. carriers pay the same settlement rates to terminate traffic to a specific country, all carriers have a clear knowledge of a significant component of their competitors' costs. To the extent all carriers are aware of competitors' costs, such knowledge exerts a chilling effect on competition and it is therefore less likely that carriers will compete aggressively. In such an environment, prices will stabilize and there will be little competition on price. If the ISP did not exist, and U.S. carriers were each able to enter into independent negotiations for the termination of international traffic without a significant danger of whipsawing by foreign carriers, U.S. carriers' costs would differ, there would be greater uncertainty, and greater pressure on U.S. carriers to compete on price, all to the benefit of U.S. consumers.

12. To address the potential anticompetitive effects of applying the ISP on routes where there is competition in the foreign market, the Commission has, over the past several years, focused

---

[15] The Commission has noted the negative effects of price signalling associated with requiring the public tariffing of retail rates in the past. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61, Second Report and Order, 11 FCC Rcd 20,730, (1996), *stayed, MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb 13, 1997), Order on Reconsideration, 12 FCC Rcd 15,014 (1997). We are concerned here that the price signalling effects of public disclosure of accounting rate information and contractual terms may have a similar anticompetitive impact.

[16] The proportionate return component of the ISP is codified at 47 C.F.R. § 43.51(e).

on reforming its accounting rate policies. The Commission has set up two separate mechanisms to allow U.S. carriers to deviate from the ISP in certain conditions. The first is international simple resale, or ISR. Under our ISR rules, the Commission allows an authorized carrier to route switched traffic over international private lines interconnected to the public switched network without requiring that such traffic be settled at the nondiscriminatory accounting rate or that inbound traffic be subject to proportionate return calculations.[17] Allowing carriers to send switched traffic over international private lines outside of the settlements process allows U.S. carriers in many cases to terminate their traffic in foreign markets at rates far lower than the bilaterally-agreed settlement rate. ISR thus puts significant downward pressure on accounting rates on routes where it is authorized. In addition, carriers are increasingly using private lines to "hub" traffic to third countries, which puts growing pressure on third country accounting rates. Currently, carriers may engage in ISR only on routes to World Trade Organization (WTO) countries where 50 percent of the traffic is settled at or below benchmark settlement rates established by the Commission, *or* to any country where the foreign market offers equivalent resale opportunities.[18] For service to non-WTO Member countries, ISR is authorized only where 50 percent of the traffic is settled at benchmark rates, *and* where the foreign market offers equivalent resale opportunities.

13. The second mechanism that allows departure from the ISP is the Commission's flexibility policy. In response to developing competition in foreign markets and the need to increase pressure to bring international settlement rates closer to cost, in 1996 the Commission adopted a policy to permit alternative settlement arrangements that do not comply with the ISP. The Commission found in the *Flexibility Order* that the parallel accounting rate and proportionate return requirements of the ISP could prevent innovative commercial arrangements and discourage competition where there is competition on the foreign end of the international route.[19] It therefore adopted a procedure to allow settlement arrangements that deviate from the uniform settlement rate

---

[17] *See Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559, 561-562 ¶¶ 17-24 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996).

[18] Originally adopted in 1991, the "equivalency" test was developed to prevent one-way inbound bypass of the settlements system, a practice that would exacerbate the settlements deficit and increase costs to U.S. carriers by reducing the number of U.S.-inbound minutes which are netted from U.S.-outbound minutes for purposes of calculating net settlement payments. *See International Resale Order*, 7 FCC Rcd 559, 561-562 ¶¶ 17-24. In 1997, the Commission adopted a benchmark settlement rate condition that prohibits U.S. carriers from engaging in ISR unless 50 percent of the traffic on a particular route is settled at or below benchmark settlement rates established by the Commission. *See International Settlement Rates*, IB Docket 96-261, Report and Order, 12 FCC Rcd 19,806, 19,916-21 ¶¶ 242-259 (1997) (*Benchmarks Order*), *recon. pending*, *appeal filed*; *Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir. filed Sept. 26, 1997). The Commission also removed the equivalency test as a requirement for authorizing ISR for service to WTO Member states, but retained it for authorization of ISR to non-WTO Member countries and countries that do not satisfy the benchmarks condition. *Foreign Participation Order*, 12 FCC Rcd at 23,930-31, ¶ 85.

[19] *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063, 20,070 ¶¶ 18, 19 (1996) (*Flexibility Order*).

and proportionate return requirements where the foreign market is open to competition.[20] The Commission also stated that it would allow settlement arrangements that deviate from the ISP where the foreign market is not competitive, but where the agreement would promote market-oriented pricing and competition while precluding the abuse of market power on the route.[21]

14. We believe these policies have been successful in encouraging increased competition among U.S. carriers and lowering settlement rates on many international routes. However, because these policies allow for deviation from the Commission's restrictive ISP only in narrowly-defined circumstances, their impact on the U.S. market for international message telephone service (IMTS) has been limited. As described in this *Notice*, we tentatively conclude that changing market conditions may warrant a further liberalization of our settlements policy.

III. Discussion

15. We believe that we should review our international settlements policies to lift unnecessary regulatory burdens in light of the significant changes in international telecommunications markets being brought about by the WTO Basic Telecommunications Agreement.[22] The WTO Basic Telecom Agreement has accelerated the global trend toward privatization and liberalization of telecommunications markets. As a result of that agreement, 28 countries committed to introducing competition for telecommunications services as of January 1, 1998. In those countries, new entrants are already providing service to customers at lower rates and higher standards of service than the former monopoly incumbent provider. For example, in northern Europe, Australia, New Zealand and elsewhere, competitive carriers are providing traditional telecommunications services along with innovative new services to customers in those countries. Given that the ISP was intended to apply to arrangements with foreign monopoly carriers, we believe we should reexamine our international

---

[20] Under the standard adopted in the *Flexibility Order* in 1996, parties seeking approval of a flexible settlement arrangement were required to show that the destination market satisfied the effective competitive opportunities (ECO) test. *Flexibility Order,* 11 FCC Rcd 20,078-84 ¶¶ 36-51. In 1997, the Commission modified this standard for parties seeking approval of flexible settlement arrangements for service to WTO Member countries. The *Foreign Participation Order* adopted a presumption in favor of flexible settlement arrangements for service to WTO Member countries. The presumption can only be rebutted by a showing that there are not multiple facilities-based competitors providing service in the foreign market that possess the ability to terminate international traffic. *Foreign Participation Order,* 13 FCC Rcd 12 FCC Rcd at 24,026-30 ¶¶ 302-313.

[21] The *Flexibility Order* maintains two safeguards for flexible arrangements: (i) alternative arrangements between affiliated carriers and those involved in non-equity joint ventures must be publicly filed with the Commission regardless of the amount of traffic affected; and, (ii) alternative arrangements affecting more than 25 percent of the inbound or outbound traffic on a particular route must also be publicly filed and may not contain unreasonably discriminatory terms and conditions. *See Flexibility Order,* 11 FCC Rcd 20,078-84 ¶¶ 36-51; *see also Foreign Participation Order,* 12 FCC Rcd at 24,026-30 ¶¶ 302-313.

[22] The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement".

settlements policy to determine whether to modify our own regulatory regime to reflect new market realities. On the other hand, this reexamination must consider that a large number of countries still have dominant operators which charge U.S. carriers settlement rates that are many times the cost of terminating international traffic.

16. We seek a new approach toward deterring arrangements between U.S. and foreign carriers that could be contrary to the public interest. As competition develops in foreign markets, we consider it appropriate to explore removing regulatory constraints on U.S. carriers that could prevent them from achieving efficiencies and adopting innovative service arrangements. We continue to believe that encouraging alternative means of routing traffic, such as international callback service, internet telephony, and switched hubbing is an effective way to lower settlement rates, as well as foreign and domestic collection rates. We believe that we should now examine whether our ISP inhibits other types of alternative routing methods that could also be powerful market-oriented tools to lower settlement rates in foreign markets.

17. For the reasons discussed in the *Foreign Participation Order,* however, we tentatively conclude that our rules should continue to apply unamended to U.S. carriers entering into arrangements with foreign carriers from non-WTO Member countries.[23] In that *Order,* we found that circumstances with respect to non-WTO Member countries had not changed significantly as a result of the WTO Basic Telecom Agreement. We therefore decided to retain the equivalency test for applicants seeking to provide ISR to a non-WTO Member country and the ECO test for entry by foreign carriers from non-WTO Member countries. We reasoned that WTO Members would be under greater pressure to liberalize and their governments would be under greater pressure to adopt pro-competitive regulatory policies than non-WTO Members. Further, we found that WTO Member countries are subject to WTO consultation and dispute resolution where they fail to comply with their market-opening commitments.[24] We are not confident, however, that non-WTO Member countries will develop the kinds of pro-competitive policies that will allow the Commission to relax its safeguards with respect to arrangements with carriers from such countries. We therefore tentatively conclude that we should not apply the approach proposed in this *Notice* to arrangements with carriers from non-WTO Member countries. We seek comment on this tentative conclusion.

A. Application of the ISP and Related Filing Requirements to Arrangements with Foreign Carriers that Lack Market Power

18. The ISP and related filing requirements were implemented to prevent whipsawing.[25] These rules currently apply to U.S. carrier arrangements for IMTS with all foreign carriers, except where a U.S. carrier receives authorization to enter into an alternative settlement arrangement under our flexibility policy or to provide ISR. We believe, however, that whipsawing is a concern that is largely associated with foreign carriers with monopoly power. Where U.S. carriers are able to terminate international traffic by interconnecting with a carrier that lacks market power, we believe

[23] *Foreign Participation Order*, 12 FCC Rcd 23,943-47, ¶¶ 119-132.

[24] *See id.*, 12 FCC Rcd 23,928-29 ¶¶ 38-39.

[25] "Whipsawing" is the practice of playing U.S. carriers off against each other in settlement rate negotiations to the disadvantage of U.S. carriers and U.S. ratepayers. *See supra* ¶ 6.

that whipsawing is not a significant danger. We thus seek comment in this *Notice* on whether we should continue to apply the ISP and related filing requirements to U.S. carrier arrangements with foreign carriers from WTO Member countries that lack market power in the relevant foreign telecommunications market.[26]

19. We note that in the *Foreign Participation Order,* we modified the No Special Concessions rule to apply only to dealings with foreign carriers that possess market power in the foreign market.[27] We stated in that order that our No Special Concessions rule is intended to address the concern that an exclusive vertical arrangement between a U.S. carrier and a foreign carrier with market power on the foreign end could result in harm to competition and consumers in the U.S. market. By contrast, we found it unlikely that an exclusive arrangement between a U.S. carrier and a foreign carrier that lacks market power would result in such harm.[28]

20. With respect to the ISP, there also appears to be little danger that a foreign carrier that lacks market power will have the ability to whipsaw U.S. carriers. Indeed, without market power over facilities and services essential to terminate international traffic, an attempt at whipsawing by a foreign carrier that lacks market power should be countered by a defection by U.S. carriers to another operator. We thus tentatively conclude that we should not apply the ISP to agreements concluded with foreign carriers from WTO Member countries that lack market power on the relevant route. U.S. carriers would therefore be free to enter unencumbered into commercial negotiations with foreign carriers in WTO Member countries that lack market power. We seek comment on whether carriers that lack market power in the foreign market may retain some ability to whipsaw where government policies or other foreign market conditions preclude real competition. We tentatively conclude that the long term benefits of removing our ISP for arrangements with foreign carriers that lack market power will outweigh any short-term risks involved. We seek comment on this tentative conclusion.

21. We also seek comment on whether to exempt U.S. carriers from filing contracts and accounting rate information under section 43.51 and 64.1001 of our rules for arrangements with foreign carriers that lack market power. Section 43.51 of the Commission's rules currently requires U.S. carriers to file all contracts entered into with their foreign correspondents with respect to the exchange of services, the interchange or routing of traffic, and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances.[29] In addition, carriers must file all changes in accounting rate arrangements under Section 64.1001.[30] In light of the exemption to the No Special Concessions rule for arrangements with carriers that lack market power, and our proposal, above, not to apply the ISP to arrangements with carriers that lack market power in WTO Member countries, we question whether there is a strong rationale for retaining these filing requirements. The filing requirements in sections 43.51 and 64.1001 enable us to enforce our ISP and maintain

---

26 *See Foreign Participation Order*, 12 FCC Rcd at 23,959-62 ¶¶ 160-163.

27 *Id.*, 12 FCC Rcd at 23,955-65, ¶¶ 150-170.

28 *Id.*

29 47 C.F.R. § 43.51.

30 *See* 47 C.F.R. § 64.1001.

regulatory oversight of accounting rate agreements. However, if we eliminate regulatory oversight of agreements between U.S. carriers and foreign carriers that lack market power, there appears to be little reason to maintain the filing requirements. Moreover, retaining our filing requirements for agreements entered into with foreign carriers that lack market power in WTO Member countries may actually inhibit U.S. carriers from entering into innovative arrangements that are pro-competitive and that could reduce rates for U.S. consumers. We therefore tentatively conclude that we should amend the Section 43.51 contract filing requirement and the Section 64.1001 accounting rate filing requirements so that contracts and accounting rate information for arrangements with foreign carriers that lack market power in WTO Member countries would not need to be filed with the Commission. We seek comment on this tentative conclusion.

22. In the *Foreign Participation Order*, we adopted a presumption, for the purpose of applying the No Special Concessions rule, that carriers with less than 50 percent market share in the relevant markets lack sufficient market power to affect competition adversely in the United States.[31] We propose to apply this same 50 percent market share presumption for purposes of determining whether to apply our ISP and related filing requirements. We seek comment on how, if we adopt our proposal to eliminate the ISP and filing requirements for arrangements with foreign carriers that lack market power in WTO Member countries, we should make the determination that the foreign carrier lacks market power. For example, should the Commission make an affirmative finding whether a foreign carrier possesses market power, or should we leave the determination of whether a foreign carrier falls outside our presumptive 50 percent market share screen, so that the ISP and our filing requirements apply, to the carrier that concludes the arrangement? We note that carriers that accept a special concession from a foreign carrier that lacks market power are currently required to file publicly contracts with the Commission along with information that the foreign carrier has a market share of less than 50 percent in the relevant markets. Opposing parties thus have the opportunity to rebut this presumption by demonstrating that the carrier indeed possesses market power.[32] If we were to adopt our tentative conclusion to eliminate the contract filing requirement for agreements with foreign carriers that lack market power in the foreign market, we seek comment on whether the Commission and potential competitors would lack the information needed to determine whether an agreement qualifies for the exception to our filing requirement and No Special Concessions rule.

23. We believe that, in most foreign markets, the determination of whether a carrier has market power is clear cut, because most foreign markets are divided between a former incumbent with a market share of well over 50 percent and new entrants with market shares far below 50 percent. Nevertheless, we recognize that there may be some need to preserve Commission oversight to ensure

[31] *Foreign Participation Order*, 12 FCC Rcd at 23,959, ¶ 160. The relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; intercity facilities or services; and local access facilities or services on the foreign end. *See id.* 12 FCC Rcd at 23,951-52, ¶ 145.

[32] *See* 47 C.F.R. § 43.51, 63.14 (1998). Our market share screen serves only as a presumption that may be rebutted by a full-fledged analysis of the foreign carrier's market power. We will also entertain petitions for declaratory ruling that a foreign carrier with a greater-than 50 percent market share does not possess market power in the foreign market. Such petitions are reviewed under an appropriate economic analysis of market power. *See Foreign Participation Order*, 12 FCC Rcd at 23,960-61, ¶ 162, n. 317.

that carriers do not engage in exclusive dealings with foreign carriers that possess market power. This oversight should, however, be balanced with our goal of allowing carriers the freedom to negotiate agreements freely with carriers that lack market power. We seek comment on several alternatives for determining whether to apply our ISP and related filing requirements to a particular arrangement. First, we could adopt a rule that arrangements with foreign carriers with less than 50 percent market share do not have to be filed, and not require any filing to substantiate the claim that the foreign carrier lacks market power. Second, we could require that a carrier that seeks to enter an arrangement with a foreign carrier that lacks market power identify the route and file a certification that the carrier on the foreign end of the international route lacks market power, without revealing the identity of the foreign correspondent. Third, we could require a carrier to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets or file a petition for declaratory ruling that a foreign carrier with greater than 50 percent market share nevertheless lacks market power. We also seek comment on whether, if we adopt this third proposal, we should allow confidential treatment for such filings.

24. We seek to simplify our regulatory requirements to the greatest extent possible, consistent with our commitment to preventing abuse of market power by foreign carriers in their dealings with U.S. carriers. We seek comment on whether our proposal to eliminate the ISP and related filing requirements for arrangements with foreign carriers that lack market power in WTO Member countries achieves this goal. Our proposals would essentially eliminate regulatory oversight for arrangements between U.S. carriers and foreign carriers that lack market power in WTO Member countries. We tentatively conclude that this approach is warranted because carriers without market power have a substantially diminished ability to whipsaw U.S. carriers. We further tentatively conclude that this approach is consistent with the regulatory framework we adopted in our *Foreign Participation Order*. We seek comment on our proposed approach for regulating arrangements between U.S. carriers and foreign carriers that lack market power in WTO Member countries, and on any other approaches that would further our goals.

B. Application of the ISP and Related Filing Requirements to Arrangements with Foreign Carriers in Liberalized Markets

25. We also seek comment on whether, under certain circumstances, we should decline to apply the ISP and related filing requirements to U.S. carrier arrangements with all foreign carriers in selected WTO Member country markets, including arrangements with those carriers that possess market power. In the *Flexibility Order*, we recognized that the ISP is not necessary in liberalized markets, and could potentially inhibit competition between U.S. carriers. We adopted a standard in that *Order*, which we subsequently revised in our *Foreign Participation Order*, for determining when a foreign market was sufficiently competitive that we would allow U.S. carriers to deviate from the ISP in their settlement arrangements with foreign carriers.[33] Under our flexibility policy, the ISP still

[33] Under the standard adopted in the *Flexibility Order* in 1996, parties seeking approval of a flexible settlement arrangement were required to show that the destination market satisfied the effective competitive opportunities ECO test. *Flexibility Order*, 11 FCC Rcd 20,078-84 ¶¶ 36-51. In 1997, the Commission modified this standard for parties seeking approval of flexible settlement arrangements for service to WTO Member countries. The *Foreign Participation Order* adopted a presumption in favor of flexible settlement arrangements for service to WTO Member countries. The presumption can only be rebutted by a showing that there are not multiple facilities-based competitors providing service in the

applies on all routes and U.S. carriers must seek prior authorization to deviate from any prong of the ISP. We propose in this *Notice* to go further than our flexibility policy, and affirmatively lift the ISP requirements for U.S. carrier arrangements with all foreign carriers in liberalized markets with low settlement rates.

26. Some carriers have taken advantage of our flexibility policy to negotiate alternative settlement arrangements with carriers from liberalized markets. However, U.S. carriers have, for the most part, continued to rely on the ISP to maintain parity in settlement arrangements with their competitors. We are concerned that continued application of the ISP on liberalized routes will impede the development of real competition among U.S. carriers. We also believe that there may be no benefit to maintaining the ISP on competitive routes. Where foreign markets are liberalized, U.S. carriers are likely to have alternatives to terminate international traffic.[34] In such circumstances, we believe that the ISP and our filing requirements may not be necessary to protect U.S. carriers against whipsawing. In addition, settlement rates are likely to be closer to cost-based levels in liberalized markets. Where settlement rates are low, the dangers to U.S. consumers from whipsawing are diminished.

27. We seek comment on what standard we should employ for identifying routes on which we should not apply the ISP. We propose to decline to apply the ISP on routes where the Commission has already authorized ISR. Under our ISR rules, U.S. carriers may serve only those routes via ISR where the destination country is found by the Commission to offer equivalent resale opportunities, or where 50 percent of the traffic on the route is settled at or below benchmark rates.[35] Where these conditions are met, there is a significantly reduced threat that U.S. consumers will be injured as a result of allowing U.S. carriers to enter freely into agreements with foreign carriers without Commission oversight.[36] The potential negative effect on U.S. carriers and consumers of whipsawing by a foreign carrier that has already agreed to settle traffic at or below benchmark rates in a WTO country may be outweighed by the pro-competitive effect that removing the ISP will have on the U.S. international service market. Moreover, because U.S. carriers are already authorized to carry

---

foreign market that possess the ability to terminate international traffic. *Foreign Participation Order*, 13 FCC Rcd 12 FCC Rcd at 24,026-30 ¶¶ 302-313. For non-WTO Member countries, the standard for permitting flexibility remains the ECO test. *Id.* at 23,946, ¶ 132.

[34] For instance, on all routes where the Commission has authorized ISR, including the U.K., Canada, Sweden, Australia, New Zealand, Denmark, the Netherlands, Germany, France, and others, U.S. carriers have the ability to interconnect directly with the local operator, rather than relying on a traditional correspondent relationship with the foreign international carrier.

[35] *See* 47 C.F.R. § 63.18(e)(4).

[36] One of the most significant dangers that whipsawing poses is that U.S. carriers will be required to agree to high settlement rates with the foreign carriers. In addition to the danger that U.S. carriers will be required to pay higher *nominal* settlement rates (*i.e.* the negotiated per-minute settlement rate, calculated without respect to return traffic flows), whipsawing by a foreign carrier with market power can take the form of increasing the *effective* settlement rate (*i.e.* the per-minute rate of terminating U.S. traffic that takes into account return traffic flows) by requiring U.S. carriers to agree to a non-50/50 split in the accounting rate or an unfavorable allocation of return traffic. *Benchmarks Order*, 12 FCC Rcd at 19,848, ¶ 87.

switched traffic over private lines, deviation from the ISP is already allowed on such routes so long as traffic flows over private lines.

28. Alternatively, we seek comment on whether a settlement rate threshold lower than a benchmark rate is appropriate. For example, we could apply the current best practices rate of $.08 per minute, established in our *Benchmarks Order*, as the threshold.[37] Under this proposal, we would decline to apply our ISP on routes where at least 50 percent of the traffic is settled at a rate of $.08 per minute or less. Commenters suggesting an alternative settlement rate threshold should provide a documented basis for any threshold suggested.

29. We also seek comment on whether any other standard is appropriate. For instance, we could decline to apply the ISP only in cases where 50 percent of traffic on the route is settled at or below benchmark rates *and* the foreign market permits U.S. carriers to provide service via ISR. We seek comment on these alternatives, and on any other alternative standard we could adopt to identify routes on which we need not apply our ISP.

30. We also seek comment on whether we should decline to apply our Section 43.51 contract filing and Section 64.1001 accounting rate filing requirements to the extent we decline to apply the ISP on certain routes.[38] As we noted above, there is little rationale in maintaining the Section 64.1001 accounting rate filing requirement where we do not apply the ISP and, in fact, requiring public filing of contracts could preclude carriers from negotiating some settlement arrangements that could be pro-competitive.[39] On the other hand, a foreign carrier with market power may still have the ability to whipsaw U.S. carriers, even on routes where we permit ISR. We also recognize that arrangements between U.S. carriers and affiliated foreign carriers may pose competitive concerns. We thus seek comment on whether we should require public filing, require confidential filing or remove the filing requirements altogether for arrangements on certain routes where we decline to apply the ISP. For instance, if we remove these filing requirements generally, should we maintain them for arrangements entered into with foreign carriers with market power, or only for affiliated foreign carriers with market power?

31. Our proposal to eliminate the ISP and related filing requirements on routes where we permit ISR would greatly reduce regulatory oversight for arrangements between U.S. carriers and foreign carriers on those routes. We believe that our proposal will further our goal of eliminating unnecessary regulatory burdens, while continuing to prevent abuse of market power by foreign carriers in their dealings with U.S. carriers. We seek comment on our proposed approach for eliminating regulatory requirements on routes where we believe they are not necessary, and on any other approaches that would further our goals.

C. Revisions to the Flexibility Policy

32. We further seek comment on what modifications we can make to our flexibility policy

---

[37] *Benchmarks Order*, 12 FCC Rcd at 19,865-71, ¶¶ 121-135.

[38] 47 C.F.R. §§ 43.51, 64.1001.

[39] *See supra* ¶ 21.

to encourage more carriers to negotiate alternative settlement arrangements. Specifically, we propose to modify our flexibility policy to limit the filing of commercial information on routes that qualify for flexibility. Our current flexibility rules require a carrier seeking to implement a flexible arrangement to obtain approval by filing a petition for declaratory ruling with the Commission. Under our rules, carriers must include a summary of the terms and conditions of the alternative settlement arrangement in their petition.[40] In addition, carriers are required under Section 43.51 of our rules to file a copy of all settlement arrangements, including alternative settlement arrangements.[41]

33. We seek comment on whether these filing requirements inhibit carriers from negotiating alternative settlement arrangements. Would a foreign carrier be less willing to negotiate a favorable arrangement with one U.S. carrier if the terms of the agreement must be disclosed to all competing carriers in the U.S. market? We seek comment on whether we should modify our flexibility policy for alternative settlement arrangements which do not trigger our *Flexibility Order* safeguards.[42] Thus, for alternative settlement arrangements affecting less than 25 percent of the inbound or outbound traffic on a particular route, and for arrangements that are not between affiliated carriers or carriers involved in a joint venture, we propose to allow carriers to file a petition for authorization to enter into a flexible settlement arrangement without including a summary of the terms and conditions of the agreement or identifying the foreign correspondent in their petition. We also seek comment on whether we should decline to apply our Section 43.51 contract filing requirement for alternative settlement arrangements in these circumstances. We note that under this proposal, carriers could only seek approval without filing agreements with the Commission to the extent the presumption in favor of flexible treatment is not rebutted (*i.e.* there are not multiple facilities-based competitors capable of terminating international traffic operating in the foreign market).[43]

34. We also seek comment on the two safeguards we adopted in our *Flexibility Order*. The first of these safeguards requires that any alternative arrangement affecting more than 25 percent of the outbound or inbound traffic on a particular route may not contain unreasonably discriminatory terms and conditions and must be publicly filed. The other safeguard requires that all alternative arrangements between affiliated carriers and carriers involved in non-equity joint ventures be publicly filed. We adopted these safeguards to protect against potential anticompetitive actions by foreign and U.S. carriers with a significant share of their markets, and to provide a "safety net" for possible unanticipated consequences of our flexibility policy.[44] We tentatively conclude that we should maintain these safeguards. We seek comment on this tentative conclusion and on our tentative conclusion to modify our filing requirements for alternative settlement arrangements that do not trigger

---

[40] In addition, carriers must file with their petition a copy of all alternative arrangements between affiliated carriers and carriers involved in non-equity joint ventures and all alternative arrangements affecting more than 25 percent of the inbound or outbound traffic on a particular route. 47 C.F.R. 64.1002 (1998).

[41] 47 C.F. R. § 43.51 (1998).

[42] See *infra* ¶ 35.

[43] *See Foreign Participation Order*, 12 FCC Rcd at 24,029-30, ¶ 312.

[44] *Flexibility Order* 11 FCC Rcd 20,081-84, ¶¶ 44-51.

our safeguards. We also seek comment, however, on whether we should modify the safeguard that currently requires all flexible arrangements entered into with affiliated carriers and joint-venture partners to be publicly filed with the Commission. Where the U.S. carrier's foreign affiliate does not possess market power in the foreign market, there is little danger that a flexible arrangement would have anticompetitive effects. The current safeguard, however, requires a U.S. carrier to make public flexible arrangements entered into with its foreign affiliate even if it lacks market power. We therefore seek comment on whether we should only require public availability of flexible arrangements entered into by U.S. carriers with affiliated carriers or with joint-venture partners that possess market power in the foreign market.

35. If we adopt these proposals, we propose to modify the flexibility policy to require only that a carrier file a certification that the arrangement does not trigger our flexibility safeguards (*i.e.*, that it affects less than 25 percent of traffic on the route and is not with an affiliate or joint venture partner) and to identify the destination market. We propose to permit other parties to file comments to rebut the presumption in favor of flexibility (demonstrating that the foreign market lacks multiple facilities-based competitors), but not comment on the nature of the flexible arrangement itself. We believe that this approach would enable U.S. carriers to enter into innovative arrangements that would otherwise not be viable if the full contents of the agreement were disclosed.

36. We note that these proposed modifications to our flexibility rule may not be needed if we adopt our proposals in this *Notice* to lift the ISP and related filing requirements for settlement arrangements with foreign carriers that lack market power in WTO Member countries and settlement arrangements on WTO country routes where we permit ISR. Our flexibility policy provides an exception to the ISP. Thus, to the extent our ISP does not apply, our flexibility rules would be irrelevant. We seek comment on the proposals in this *Notice* for modifying our flexibility policy, and on any other modifications to our flexibility policy that would further our goals of encouraging the negotiation of more market-based arrangements and eliminating unnecessary regulatory burdens.

D. Revisions to ISR Rules

37. We also seek comment on whether we should modify our ISR rules as a mechanism for putting greater pressure on settlement rates. In our *Accounting Rate Policy Statement*, we stated our support for new services that encourage arbitrage of the international accounting rate system, including ISR.[45] We have also recognized, however, that authorization of ISR could lead to "one-way bypass" of the accounting rate system, where private lines are used only for inbound switched traffic into the United States while outbound switched traffic from the United States remains subject to the accounting rate system. Such one-way bypass could increase the net settlement payments of U.S. carriers, and ultimately could lead to increased calling prices for U.S. consumers. To prevent one-way bypass, we have adopted rules that permit carriers to engage in ISR only on routes to WTO Member countries where 50 percent of the traffic is settled at benchmark rates, *or* to any WTO country where the foreign market offers equivalent resale opportunities.[46] For service to non-WTO Member countries, our rules permit ISR only on routes where 50 percent of the traffic is settled at benchmark rates, *and* where the foreign market offers equivalent resale opportunities.

---

[45] *Policy Statement on International Accounting Rate Reform,* 11 FCC Rcd 3146, 3152-53, ¶¶ 21-23.

[46] *See* n. 18, *supra.*

38. We seek comment in this *Notice* on whether we can permit ISR on more routes, consistent with our commitment to prevent one-way bypass. For example, should we permit carriers to provide ISR for a limited amount of traffic on routes where we would otherwise not authorize the provision of ISR? We believe that a limited offering of ISR could put significant pressure on settlement rates, while limiting the potential damage from one-way bypass. Another approach might be to decide in advance to lift our ISP requirement at some future point when international markets have become sufficiently competitive overall, *e.g.* when 50 percent of routes have been approved for ISR. We note that regulators in other markets that allow ISR, such as the United Kingdom, Sweden, Germany, and others, do not impose restrictions on ISR similar to those we have in place in the United States. We seek comment on whether it is possible to deter foreign carriers from engaging in one-way bypass that distorts the U.S. market through an approach other than prohibiting ISR altogether. For example, in the *Benchmarks Order* we adopted a safeguard that would impose sanctions on a carrier whose provision of ISR results in a market distortion, *i.e.*, one-way bypass.[47] We adopted a presumption that a market distortion would occur if the ratio of inbound/outbound traffic increases by ten or more percent over two successive reporting periods.[48] We seek comment on whether this or a different competitive safeguard would be an effective means of preventing one-way bypass in lieu of our existing safeguards, either now or as competitive conditions evolve.

E. Application of the No Special Concessions Rule and Other Safeguards

39. We seek comment on the effect of adopting the above proposals on our No Special Concessions rule as well as on the existing ISR and flexibility policies. We also seek comment on whether additional safeguards are necessary to address any possible competitive distortion that may result from limiting the scope of our ISP. We note that if we adopt our proposals to scale back our application of the ISP, our flexibility and ISR policies will apply only to arrangements with foreign carriers with market power in foreign markets to which the Commission does not allow ISR and to arrangements with carriers in non-WTO Member countries.

40. Our No Special Concessions rule prohibits U.S. international carriers from "agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market . . . ."[49] We seek comment on whether to

---

47 Such enforcement action could include prohibiting carriers from providing switched services over private lines until at least 50 percent of the traffic on the route is settled at the best practices rate of $.08 adopted in the *Benchmarks Order*, or a revocation of carriers' authorization to provide service. *See Benchmarks Order*, 12 FCC Rcd at 18,908-09, ¶ 224.

48 *Benchmarks Order*, 12 FCC Rcd at 18,919, ¶ 249.

49 47 C.F.R. § 63.14(a) (1998). A "special concession is defined as "an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed carriers and involves:

"(1) operating agreements for the provision of basic services;

"(2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as maintain the No Special Concessions rule for U.S. carrier arrangements with foreign carriers with market power if we adopt the proposal in this *Notice* not to apply the ISP and related filing requirements on ISR routes.[50] It may be necessary to maintain the No Special Concessions rule because it applies more broadly than the ISP. For example, the No Special Concessions rule prohibits U.S. carriers from agreeing to accept from a foreign carrier that possesses market power exclusive arrangements with respect to operating agreements, interconnection of international facilities, private line provisioning and maintenance, as well as quality of service. The ISP, however, applies only to the settlement of international traffic and allocation of return traffic.[51] We seek comment on whether such exclusive arrangements with a foreign carrier that possesses market power could adversely affect competition in the U.S. market on routes where we permit ISR, such that we should continue to apply the No Special Concessions rule.

41. We also seek comment on the extent to which the No Special Concessions rule applies within the context of our ISR and flexibility policies in light of the changes to our rules proposed in this *Notice*. In the *Flexibility Order* the Commission stated that arrangements approved under the flexibility rules are permitted as an exception to the No Special Concessions rule.[52] By contrast however, we have not made clear how the No Special Concessions rule applies to the settlement of traffic under an ISR arrangement. An ISR arrangement between a foreign carrier and a U.S. carrier, for example, could be viewed as a prohibited special concession if the foreign carrier also exchanges traffic in a traditional correspondent relationship with other U.S. carriers under financial terms and conditions that differ from those governing the ISR arrangement. We believe that such an interpretation of our No Special Concessions rule was not contemplated when we adopted our ISR policy.[53] We therefore tentatively conclude that our No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including allocation of return traffic, by a U.S. carrier on an ISR route. Notwithstanding an ISR arrangement, however, the No Special Concessions rule would prohibit exclusive arrangements with a foreign carrier with market power with respect to interconnection of international facilities, private line provisioning and maintenance, as well as quality of service. We seek comment on this tentative conclusion. We also seek comment on whether we should apply the No Special Concessions rule in this manner if we decide to retain the No Special Concessions rule for U.S. carrier arrangements that deviate from the ISP on ISR routes, as discussed above.[54]

---

provisioning and maintenance times; or
"(3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers." 47 C.F.R. § 63.14(b).

50 *See* Section III.B., *supra*.

51 *See supra* ¶ 6.

52 *Flexibility Order*, 11 FCC Rcd at 20,084, ¶ 51.

53 *See International Resale Order*, 7 FCC Rcd 559.

54 *See supra* ¶ 40.

42. Finally, although we seek to remove regulatory impediments to competition, we recognize that carriers that possess market power in the foreign market may have the potential to leverage that market power into the U.S. market. By removing the ISP and transparency requirements, we may be removing measures which limit the ability of such carriers to distort competition in the U.S. market. We therefore seek comment on whether we should adopt additional safeguards to prevent a competitive distortion, such as one-way inbound bypass, and on measures we should take in the event a competitive distortion occurs. For instance, we seek comment on whether we should modify our reporting requirements in order to more easily detect such a competitive distortion. We also seek comment on what measures we can take to ensure that the Commission is able to take swift action in the event of a competitive distortion. We recognize, however, that any safeguards we adopt may, to the extent they are not absolutely necessary, preclude carriers from responding to market influences and concluding agreements that may bring settlement rates closer to cost.

43. We note in particular that removing our ISP and filing requirements may, in certain cases, allow carriers to conclude some types of arrangements upon which the Commission has not yet ruled. For example, commenting parties in other proceedings have expressed concern regarding whether carriers may negotiate arrangements to accept "groomed" traffic, *i.e.* traffic that terminates in particular geographic regions. In the *LEC Regulatory Treatment Order*, the Commission stated that it was not prepared to rule that grooming arrangements are anticompetitive *per se*. It noted, however, that such grooming arrangements could be cause for concern, and that such agreements would be subject to public comment and review in circumstances where the arrangement deviates from existing arrangements with other U.S. carriers for the routing and/or settlement of traffic on the route.[55] If we adopt our above proposal to remove the ISP and our filing requirements with respect to arrangements with carriers with market power in selected markets, we would no longer require pre-approval or public filing of such arrangements. We seek comment on whether these types of grooming arrangements present a potential for anticompetitive effects, particularly with respect to arrangements between foreign carriers with market power and incumbent local exchange carriers. We also seek comment on whether the potential for such anticompetitive effects would justify an exception to our proposals to relax our application of the ISP or whether it would justify application of other safeguards.

F. Accounting Rate Filing Changes

44. Currently, the Commission requires that carriers seek approval for changes in their accounting rate arrangements with foreign correspondents. Under the procedures set out in the Commission's rules, carriers seeking such approval must file either a modification request or a notification.[56] The notification requirement applies to simple reductions in the applicable accounting rate. Such notifications must be filed prior to the effective date of the change in the accounting rate. Grant of these filings is automatic the day after filing. The accounting rate modification filing procedures apply to all other changes in accounting rates (except flexibility filings), including

---

[55] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Second Report and Order, 12 FCC Rcd 15,756, 15,837-39 (1997) (*LEC Regulatory Treatment Order*).

[56] 47 C.F.R § 64.1001 (1998).

retroactive changes in the applicable accounting rate. Modification filings are automatically granted 21 days after filing if the filing is unopposed and the International Bureau has not notified the applicant that approval of the modification may not serve the public interest. Where a filing is not automatically granted, approval is only granted by formal action of the Bureau.

45. When the Commission established the option of filing an accounting rate notification rather than a modification (or ISP waiver, as it was previously known),[57] the Commission found that allowing a simple reduction in the accounting rate to go into effect upon filing would reduce regulatory impediments to lowering accounting rates.[58] Since that time, the Bureau has gained significant experience with these procedures and received information about their effectiveness. The Bureau's experience indicates that there is confusion regarding the filing procedures applicable to a given agreement. For instance, in many cases carriers seek to use notification filing procedures for accounting rate arrangements that should be filed under modification procedures, causing increased staff workload and additional paperwork for filing parties.

46. In light of the confusion caused by the existence of two standards for accounting rate filings, along with the fact that few filings are made under the notification procedure,[59] we find that adopting the notification filing procedure has not had its intended effect of removing regulatory barriers to simple reductions in accounting rates. On the contrary, it is our experience that having two procedures for accounting rate filings has made procedures more complicated than they need to be. We therefore tentatively conclude that we should remove the option of filing a notification and require that all accounting rate filings be governed under the existing procedures for accounting rate modifications. We seek comment on this tentative conclusion.

47. Our international settlements policy requires that U.S. carriers not accept exclusive settlement arrangements with foreign carriers and prohibits U.S. carriers from entering into any arrangement not made available to all U.S. carriers providing service on the route. For this reason, carriers making modification or notification filings are required under our rules to serve a copy of their filings on all facilities-based carriers providing services on the same route.[60] This requirement was developed when only two or three carriers provided facilities-based service on a given route. Today, on the U.S.-Canada route, there are six carriers providing facilities-based service. We seek comment on whether to continue to maintain this service requirement, or whether another approach is warranted. Further, petitions seeking approval of a flexible settlement arrangement are placed on public notice. We received comment in the *Foreign Participation* proceeding that urged us also to adopt a public notice approach for accounting rate filings. We stated in the *Foreign Participation Order* that we did not find it necessary at that time to adopt the proposal, but that we reserved the

---

57 *See Flexibility Order*, 11 FCC Rcd 20,063.

58 *See International Settlement Rates*, CC Docket 90-337, First Report and Order, FCC 91-157, 6 FCC Rcd 3552 (1991) (*First Report and Order*).

59 In 1997, the Commission received seven notification filings and 808 modification filings.

60 47 C.F.R. 63.1001(k); *see First Report and Order*, 6 FCC Rcd 3552.

right to consider the issue in the future if warranted.[61]

48. The Commission is implementing an electronic filing system that will replace the current paper filing system for accounting rate modifications. This system will automatically generate reports of all accounting rate filings and will be available over the Internet on the Commission's web page. We seek comment on whether, in light of detailed information regarding accounting rate filings that will be available on the Internet, we can eliminate the increasingly cumbersome requirement that copies of accounting rate filings be served on all carriers providing service on a given route. We seek comment, alternatively, on whether the Commission should issue a public notice when it receives accounting rate filings instead of maintaining the service requirement. Due to the significant volume of such filings, we tentatively conclude that the information contained in public notices for accounting rate filings would be far less helpful than the information that will be available on the Commission's web page.

49. We seek comment on these proposed changes to our accounting rate modification and notification filing requirements. We also seek comment on any other modifications that would simplify our regulations but also enable the Commission and interested parties to obtain the information necessary to monitor accounting rate agreements effectively, where necessary.

G. Issues Raised in Petitions for Reconsideration of the *Flexibility Order*

50. Following adoption of the *Flexibility Order,* the Commission received petitions for reconsideration from several parties, requesting that the Commission alter its competitive safeguards to differing degrees. In light of the above proposals to modify our ISP, we seek further comment on the issues raised by parties that filed petitions for reconsideration in the *Flexibility* proceeding. AT&T raises two issues in its petition for reconsideration. First, AT&T seeks elimination of the approval criteria and filing obligations imposed on flexible arrangements that involve 25 percent or more of *outbound* traffic. Second, AT&T asks the Commission to clarify that the ECO test is not the only dispositive factor in favor of allowing flexible arrangements and that other public interest factors will be considered.[62] AT&T claims that a market that satisfies ECO does not necessarily ensure the existence of cost-based accounting rates or satisfy the ISP principle of proportionate return. PBCom and NYNEX both filed Petitions for Reconsideration arguing that the Commission should modify the 25 percent safeguard by adopting a presumption that exclusive arrangements between foreign carriers and U.S. international carriers are unreasonably discriminatory.[63] TMI requests that the Commission clarify that the ISP does not apply to regional mobile satellite services (MSS) for the same reasons it found that the ISP does not apply to global MSS.[64]

51. We too are concerned that the competitive safeguards adopted in the *Flexibility Order*

[61] *Foreign Participation Order*, 12 FCC Rcd at 24,030, ¶ 313.

[62] *See* AT&T Petition for Reconsideration in CC Docket 90-337.

[63] PB Comm Petition for Reconsideration in CC Docket 90-337; NYNEX Petition for Reconsideration in CC Docket 90-337.

[64] TMI Petition for Reconsideration in CC Docket 90-337.

may need to be modified in order to stimulate competition and allow carriers to respond more rapidly to changing conditions and ultimately lower calling prices for consumers. As noted above, in the *Foreign Participation Order*, the Commission modified the standard under which it would consider alternative settlement arrangements. In addition, also discussed above, the Commission modified its No Special Concessions rule. These changes, together with the proposals described in this notice will likely have a significant effect on our flexibility framework. We therefore invite interested parties to comment on the issues raised in the petitions for reconsideration of the *Flexibility Order* in light of the recent changes in our rules and the proposals detailed above.

IV. Procedural Issues

A. *Ex Parte* Presentations

52. This is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Initial Regulatory Flexibility Certification

53. The Regulatory Flexibility Act (RFA)[65] requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[66] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[67] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[68] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[69] The rule changes proposed in this *Notice* may directly affect approximately 10 facilities-based international telecommunications carriers. Neither the Commission nor SBA has developed a definition of "small entity" specifically applicable to these international carriers. Therefore, the definition to be used is the most appropriate definition under the SBA rules,

---

[65] The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[66] 5 U.S.C. § 605(b).

[67] *Id.* § 601(6).

[68] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632).

[69] Small Business Act, 15 U.S.C. § 632.

which here is the definition of Communications Services, Not Elsewhere Classified (NEC).[70] Under this definition, a small entity is one with $11.0 million or less in annual receipts.[71] Based on information filed with the Commission, the subject facilities-based international telecommunications carriers do not fall within the above definition of "small entity" because they each have more than $11.0 million in annual receipts. We therefore certify that this *Notice* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this *Notice*, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration.[72] A copy will also be published in the Federal Register.[73]

C. Initial Paperwork Reduction Act of 1995 Analysis

54. This *Notice of Proposed Rulemaking* contains either a proposed or a modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from publication of this *Notice* in the *Federal Register*. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

55. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 16, and reply comments on or before October 16. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

56. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may

---

[70] 13 CFR § 120.121, SIC code 4899. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[71] *Id*

[72] 5 U.S.C. § 605(b).

[73] *Id.*

also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

57. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Room 222, Washington, D.C. 20554.

58. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Donna Christianson, International Bureau, Federal Communications Commission, 2000 M Street, N.W., Room 836, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (Docket No.-98-148), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

59. Written comments by the public on the proposed and/or modified information collections are due on or before 60 days after publication of this *Notice* in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov.

E. Ordering Clauses

60. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i)-(j), 201(b), 214, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 214, 303(r), and 403, this Notice of Proposed Rulemaking IS HEREBY ADOPTED.

61. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

Separate Statement of Commissioner Harold W. Furchtgott-Roth

In re: Notice of Proposed Rule Making

1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements

I support adoption of this NPRM. In my view, any reduction of unnecessary regulatory burdens is beneficial. To that extent, this item is good and I am all for it. This item should not, however, be mistaken for complete compliance with Section 11 of the Communications Act.

As I have explained previously, the FCC is not planning to "review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added). *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998). Nor has the Commission issued general principles to guide our "public interest" analysis and decision-making process across the wide range of FCC regulations.

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "*determine* whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules pursuant to Subsection 11(a).